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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 462

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington Public Power Supply System prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered March 24, 1966 (Case No. 18,728), affirming a decision of the Federal Power Commission.

INTRODUCTION

Washington Public Power Supply System (hereafter "Public Power"), a public agency of the State of Washington,[1] and Pacific Northwest Power Company (hereafter "the Company"), a privately owned entity, are competing applicants for a license under the Federal Power Act for a hydroelectric project at the High Mountain Sheep site on the Snake River. (See map, App. A, p. 7a.) The Federal Power Commission, by a 3-2 vote (Chairman Swidler and Vice Chairman Black dissenting), overruling its staff counsel, rejected Public Power's claim to a preference under Section 7(a)[2] and licensed to the Company the power development which was proposed by Public Power, substantially larger than any proposed by the Company. The majority did so on the sole ground that the Company had "priority" to a license under Section 5[3] as holder of a preliminary permit, even though (1) the Company's only permit had been issued for the investigation of an entirely different project at a different location on the river, stating its "sole purpose" to be

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[1] The Supply System is a "joint operating agency" composed of 16 public utility districts serving power in 16 counties containing about half of Washington's population. It is a "municipality" as defined in the Federal Power Act, App. A, p. 4a, n. 1.

[2] Section 7(a) provides: "In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued . . . the Commission shall give preference to applications therefor by States and municipalities . . . ." App. G, p. 167a.

[3] Section 5 provides: "Each preliminary permit . . . shall be for the sole purpose of maintaining priority of application for a license . . ." during a period not exceeding three years "for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements." App. G, p. 166a.

to maintain priority of a future license application on *that* specific project, and (2) the Commission had rejected the Company's license application on that project in another proceeding.

The Commission's unprecedented decision, affirmed by the Court of Appeals, gives every permittee a novel "first right" to a license on all sites *outside* his permit at which a hydroelectric project better adapted than his own to the development of the river may be proposed by a competing license application.

This revolutionary interpretation of the Federal Power Act (1) reverses the policy of Congress which gives preference to public development of power resources (in this case, a public project far superior to the Company's), (2) puts all competitive planning of river basin development by both public and private entities into "deep freeze" for the benefit of a sponsor of an admittedly inferior scheme, and (3) injects insupportable confusion into the administration of public lands and navigable streams under other federal statutes as well as the Federal Power Act.

As Chairman Swidler's dissent put it:

> "This case represents the first direct legal contest concerning the construction of section 7(a) in relationship to sections 4(f) and 5. In this benchmark decision the majority of the Commission proposes to interpret sections 5 and 7(a) in a manner which gives the priority of a preliminary permit great and elastic reach while narrowly circumscribing the scope of the preference clause. They have done violence to the statute on both scores."[4]

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[4] App. B, p. 123a.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported in 358 F.2d 840, and printed in Appendix A to this Petition, p. 2a.

The decision of the Federal Power Commission, February 5, 1964 (Opinion No. 418), is reported at 31 F.P.C. 247, and is printed in Appendix B, p. 17a. The dissents of Chairman Swidler and Vice Chairman Black appear in Appendix B, pp. 100a, 128a. The decision of the Commission, April 30, 1964 (Opinion No. 418-A), denying petition for rehearing and stay, is reported at 31 F.P.C. 1051, and is printed in Appendix C, p. 129a. The dissent of Vice Chairman Black on rehearing, joined by Chairman Swidler, appears in Appendix C, p. 148a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on March 24, 1966. Its jurisdiction was based on Section 313(b) of the Federal Power Act, 16 U.S.C., Sec. 8251. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

THE QUESTION PRESENTED

When the Federal Power Commission, in issuing a power company a preliminary permit under Section 4(f) of the Federal Power Act to investigate specifically identified sites for a hydroelectric project on public lands or navigable waters, restricts the project boundaries by precise reference to the public land surveys, and so notifies the States and affected public agencies which have a statutory preference to a permit and license under Section 7(a), does Section 5 of the Act nevertheless vest in the permittee not only a prior-

ity to a license upon the sites encompassed by the permit, but also an implied "first right" to a license upon all competing sites outside the permit's boundaries at which a dam, if constructed, would be better adapted than the permittee's own project for the development of the same "reach" of the river, with the consequences that

(1) the preference which Section 7(a) accords to the competing license application of a public agency is forever after nullified, without notice, as to all these undisclosed additional sites which the permittee may later elect to substitute;

(2) if any competitor, public or private, applies for a license for a project better adapted than the permittee's own for development of the same reach of the river by utilization of a site outside the permit's boundaries, the permittee is entitled to substitute that competing project for his own, and receive a license thereon; and

(3) the public lands and navigable waters of the United States are encumbered by the permit *ab initio* beyond its stated limits, without further notice to any federal agency, just as though the permit's boundaries had always included all other areas which the permittee may elect to add?[5]

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[5] If certiorari is granted upon the foregoing question, the Petitioner requests the privilege of also briefing and arguing two other issues on which Chairman Swidler and Vice Chairman Black dissented: (a) whether the permit terminated as a matter of law when the Commission, in an earlier proceeding, denied the Company's application for a license on the project described in the permit, and (b) whether the permit continued for 18 months after its stated expiration date to confer a priority with respect to the new project now before the Court, which was primarily investigated and designed during that post-expiration period.

STATUTE INVOLVED

The statutory provisions primarily involved are Sections 4(e), 4(f), 5, 7(a), 7(b), and 10(a) of the Federal Water Power Act of 1920, 41 Stat. 1063, as amended, 16 U.S.C. §§ 797(e)-(f), 798, 800, 803(a) (1964). These are printed, with other relevant sections of the Federal Power Act, in Appendix G, pp. 164a-169a. Relevant regulations of the Commission are printed in Appendix H, pp. 169a-180a.

STATEMENT OF THE CASE

The "High Mountain Sheep" damsite, here in dispute, is on the Snake River where it constitutes the boundary between Oregon and Idaho, about 15 miles upstream from the Washington line. It is above the confluence of the Snake and Salmon Rivers, and below the mouth of the Imnaha River. (See map annexed to the opinion below, at App. A, p. 7a.) The Snake is navigable at this point and public lands of the United States are involved. Public Power claims a preference to a license under Section 7(a) of the Federal Power Act. The Company claims priority to a license under Section 5 as holder of a preliminary permit issued under Section 4(f).

The questions involved are solely questions of law.

As the court below said:

> "This statutory provision undoubtedly gave the Public Power System preference over Pacific Northwest (provided its application met all requirements) if no preliminary permit had been issued."[6]

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[6] App. A, p. 5a.

The facts are not in dispute.

No preliminary permit purporting to encompass the High Mountain Sheep site has ever been issued to anyone. But, in 1955, three years before the Company applied for a license on the High Mountain Sheep site, it was issued a preliminary permit under Section 4(f), corresponding exactly to its application, to investigate another project upstream on the Snake River.[7] The permit identified that project (No. 2173) as follows:

> "As described in the application, the proposed project would consist of two water-power developments designated as Mountain Sheep and Pleasant Valley and described respectively . . . ."[8]

Here follows a description of the two dams, with locations identified by quarter-quarter sections of the public land surveys, and by reference to nearest one-tenth of a river-mile. Mountain Sheep Dam, relatively low, was to be 3.7 miles upstream from the site now in controversy. Pleasant Valley Dam was to be a high dam about 21 miles still farther upstream. A map annexed to the application showed the project boundaries with similar exactitude.[9] These boundaries excluded the High Mountain Sheep site by several miles. The permit states:

> "(A) This preliminary permit is issued . . . for the sole purpose of maintaining priority of application for a license for Project No. 2173 . . . ."[10]

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[7] App. E, p. 153a.

[8] App. E, p. 154a.

[9] Reg. 4.82 (H) and (I) require submission of a map on a scale to present effectively a tentative project boundary which, if public lands are involved, "shall be the line enclosing all quarter-quarter sections, lots, and other smallest legal subdivisions of public-land survey which may be occupied or used in whole or in part by the project." App. H, pp. 179a-180a.

[10] App. E, p. 157a.

Section 4(f) of the Act requires that upon the filing of any application for a preliminary permit the Commission, "before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application," and also publish the same. The notice so given to public agencies described the project exactly as the application and permit did.[1] *No notice was ever given to anyone that a priority for a possible license application on the High Mountain Sheep site was sought by the Company's application for a permit on the Low Mountain Sheep-Pleasant Valley sites.*

The permit for Project 2173 was never amended to include the High Mountain Sheep site.[2]

The Company subsequently applied for a license on Project 2173. The Commission, after hearing, rejected that application on its merits.[3]

In 1958, on the last day of the permit's 3 year period, the Company filed its present license application, in skeleton form, completing it some 18 months later.

There is no resemblance whatever between (1) the Company's Project No. 2173 as described uniformly in its permit application, notice to public agencies, and permit, and (2) the Company's Project No. 2243, as described in its present High Mountain Sheep license application. This is true as to location, height of dams,

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[1] App. D, p. 152a.

[2] Reg. 4.84 provides, in part: "If an application for an amendment embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application." App. H, p. 180a.

[3] Opinion and Order Denying Application for License, Pacific Northwest Power Co., Project No. 2173, January 20, 1958, 19 F.P.C. 127.

reservoir capacity, generating capacity, and all other features.[4] For example, the High Mountain Sheep dam would be located below the mouth of the Imnaha River, flooding an important tributary, whereas both of the dams covered by the permit would be located upstream from that confluence. The High Mountain Sheep Dam, 670 feet high, would impound seven times as much water as would the two dams described in the permit, both together. It would be 420 feet higher than the nearer of the two, 136 feet higher than the distant one. It would have more than twice as much ultimate installed generating capacity as would the two upstream dams, combined.

The Commission, nevertheless, by a 3-2 vote, held that, as a matter of law, the permit for the rejected project entitled the Company to a priority for a license application on the new site, outside the permit's boundaries, and that this priority precluded Public Power's preference thereon under Section 7(a). The majority's rationale was that the statutory intent of the Act is to give a permittee "the first right to develop that reach of a river to which the permit relates."[5] To this the minority responded.[6]

> "It is dispositive of the whole case that PNPC never sought—indeed, that it deliberately avoided seeking—a preliminary permit for HMS.
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> * * * * * *
>
> "The rule enunciated by the majority means that a permit for a particular project affords the

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[4] See comparison made by Chairman Swidler, dissenting, in App. B, p. 111a. The Company's High Mountain Sheep project is described in the Commission's original opinion, App. B, p. 78a, item (ii). The quite different project covered by the permit is described at App. E, p. 154a.

[5] App. B, p. 49a, quoted by the court, App. A, p. 9a.

[6] App. B, pp. 111a, 113a.

> applicant a priority over any other projects 'affecting essentially the same reach of the river.' Applied to this case it means that the preliminary permit to PNPC for two low dams granted it a priority over any other applicant for High Mountain Sheep or Nez Perce, both of which projects affect the same reach of the Snake River, even though both High Mountain Sheep and Nez Perce are downstream from the two low dams, flood out portions of other rivers (the Imnaha and the Salmon) and by any fair standard are different projects from the MS-PV project."

No question of Commission expertise is involved. All agree now that the project "best adapted to a comprehensive plan of development" is the High Mountain Sheep project proposed by Public Power, not that proposed by the Company. While the Company's High Mountain Sheep project was better than its rejected Low Mountain Sheep-Pleasant Valley project, it was markedly inferior to Public Power's proposed High Mountain Sheep project.[7] Public Power presented plans for an initial development 30 per cent larger, an ultimate capacity 14 per cent larger, than the Company's High Mountain Sheep project.[8]

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[7] This site was second choice for both applicants. Public Power first applied for a license on the Nez Perce site, below the Salmon, but amended during trial to include High Mountain Sheep when conflict with preservation of fish runs on the Salmon appeared insurmountable. App. B, p. 86a, para. F.

[8] Public Power's project comprised an initial installation of six units of 200,000 kw. each (1,200,000 kw. altogether) with provision for four additional such units (*i.e.*, an ultimate installation of 2,000,000 kw.). The Company proposed a much smaller High Mountain Sheep power development, with a different design: an initial installation of five units of 175,000 kw. each (875,000 kw. altogether), with provision for five additional such units (*i.e.*, an ultimate installation of 1,750,000 kw.). (App. B, pp. 22a, 23a.)

The Commission's original opinion in the present case approved the Company's smaller power development.[9] But on rehearing the Commission said.[10]

> ". . . to avoid any possible ambiguity, we are modifying our order to describe the project works at the HMS site; which, on the basis of present information, *we find to be best adapted to a comprehensive plan of development under the test set forth in Section 10(a) of the Act.*" (Emphasis supplied.)

The Commission accordingly substituted a new project description. It is exactly the description of the larger power development proposed by Public Power.[1] The Commission nevertheless licensed Public Power's High Mountain Sheep project to the Company.

The Court of Appeals affirmed, adopting the Commission's construction of the statute.

The court also affirmed the Commission's rejection of the contention of the Secretary of the Interior that the project should be recommended to Congress under Section 7(b) for federal construction.[2]

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[9] App. B, p. 79a.

[10] App. C, p. 144a.

[1] App. C, p. 147a, *cf.* App. B, p. 23a.

[2] Case No. 18,731, App. A, p. 15a; App. B, p. 69a.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURT'S REJECTION OF THE FEDERAL POWER ACT'S MANDATE TO PREFER THE LICENSE APPLICATIONS OF PUBLIC AGENCIES PRESENTS A MAJOR FEDERAL QUESTION OF FIRST IMPRESSION WHICH PROFOUNDLY AFFECTS THE DEVELOPMENT OF THE NATION'S WATERWAYS, AND WHICH ONLY THIS COURT CAN SETTLE.

1. This "benchmark decision" has Nation-wide impact: It sets new ground rules for the development of substantially all of the Nation's remaining hydroelectric resources.

Nearly all of the Nation's future hydro-development, with potentially more than two and one-half times the capacity of all the hydro projects now in existence, will involve federal lands or navigable streams, and will therefore be controlled by the permit and license system of the Federal Power Act as construed in the case at bar. The Federal Power Commission has reported that as of January 1, 1964, the undeveloped hydroelectric resources of the United States comprised 1,711 new sites with potential installed capacity of 115,733,891 kilowatts. These are located in substantially every major river basin in the Nation. For comparison, the hydroelectric projects heretofore developed comprise 1,602 sites with 40,230,291 kilowatts of installed capacity.[3]

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[3] FEDERAL POWER COMMISSION, HYDROELECTRIC POWER RESOURCES OF THE UNITED STATES, DEVELOPED AND UNDEVELOPED, January 1, 1964, p. xi.

The statistics given above do not include the very large potential development of pumped storage projects to which the Federal Power Act is held applicable in Federal Power Commission v. Union Electric Co., 381 U.S. 90 (1965).

For a discussion of the magnitude of the Nation's potential pumped storage development, now in its infancy, see FEDERAL POWER COMMISSION, 1 NATIONAL POWER SURVEY, pp. 124-26 (1964).

2. The decision so inflates the scope and function of a preliminary permit as to give the permittee the same exclusive rights outside the permit's boundaries as within them, with results disastrous to the congressional objectives.

The Commission's rationale, quoted and approved by the court,[4] is that the statutory intent "is to give a permittee the first rights to develop that reach of a river to which the permit relates." But neither the statute, the Commission, nor the court tells us what this vague term "reach" means. The word is a stranger to the statute. So is the concept of a permittee's "first right" or option extending to federal lands he never applied for and was never granted.

If sustained, this rewriting of the statute destroys the major congressional objectives next discussed.

3. The decision nullifies the congressional policy of preference to public agencies in the development of the Nation's hydroelectric power, with respect to all sites which the permittee elects to substitute for those encompassed by his permit.

What this new concept means, in our case, is that when the Company in 1955 asked for and obtained a permit to occupy and investigate two sites for a power project that turned out to be a poor one and was later denied a license, it also received, in 1955, without applying for it, and without notice to anyone, an exclusive right to be exercised in 1958 to take also the High Mountain Sheep site, 25 miles distant from the Company's major damsite, nearly 4 miles outside the nearest boundary of the permit—to take that new site away from a public agency which had a statutory prefer-

[4] App. A, p. 9a.

ence right to it, and to do so by submitting a second poor project, so inferior that the Commission rejected that one too, on rehearing. But it licensed to the Company the superior High Mountain Sheep development proposed by Public Power.[5] This completely distorts the statutory preference, here and hereafter.

The Act's preference to public development of the Nation's waterways is one of its two dominant mandates. The other is the selection of the plan best adapted to the comprehensive development of a waterway.[6] Where, as here, the license application of a public agency is determined by the Commission to offer the superior plan, the two purposes converge, and "the command is flat," as the Commission's minority said.[7]

The statutory command contains only one exception: where a preliminary permit has been issued. To safeguard the preference against loose use of this exception, the statute requires notice to "any State or municipality likely to be interested in or affected by such application," upon the filing of any permit application, and before the Commission acts on it.[8] The regulations are even more explicit about this notice. The permit application must be accompanied by a map which, if public lands are involved (as they were here) "shall be on a scale to present effectively a tentative project boundary which shall be the line enclosing all quarter-quarter sections, lots and other smallest legal subdivisions of public-land survey which

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[5] App. C, p. 147a. *Cf.* App. B, p. 23a.

[6] Sec. 10(a), App. G, p. 168a.

[7] App. B, p. 101a.

[8] Sec. 4(f), App. G, p. 166a.

may be occupied or used in whole or in part by the project."[9] (This was done in 1955; the map excluded High Mountain Sheep by several miles.) The Commission is required to give notice of this precise boundary to affected federal, State, and municipal agencies.[10] This was done; see the notice given in our case, at App. D, p. 152a. (Note the exact description of the area sought by the application, again excluding High Mountain Sheep, nearly a township away.) A hearing on such a permit application may be demanded by any party in interest.[1] Amendments are provided for. Significantly, *"if an application for an amendment embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application."*[2] (This was never obeyed, in our case.)

The reason for specificity in the notice to public agencies is plain: if a permit issues, the preference to public agencies is neutralized, once for all, then and there, *on the project covered by the permit* (our emphasis). The preference cannot be revived later at the licensing stage. The notice of the permit application must therefore explicitly describe what it preempts; conversely, nothing excluded by the notice is acquired by the permittee. This is shown by Section 4(e) of the Act, which requires no notice at all to a public agency of a company's license application if (and *only* if) that application was preceded by a preliminary permit.

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[9] Reg. 4.82, App. H, pp. 178a-180a.

[10] Reg. 4.81, App. H, p. 178a.

[1] Reg. 4.83, App. H, p. 180a.

[2] Reg. 4.84, App. H, p. 180a.

This decision destroys these statutory safeguards of the public preference. It scorns the specificity required by the statute and regulations. Public agencies can no longer know, from reading the notice they receive, what sites are preempted by the permit. They cannot find this out because the Commission does not know either, and will not know until the permittee files his license application, or series of applications, as in this case. An exhaustive study of a whole river basin may be required to determine the interrelationship of various alternative projects, all now held to be preempted by a permit application for only one of them.

Chairman Swidler, dissenting, commented:[3]

> ". . . Thus, to require specificity in the application, and thereupon to construe it as covering projects not specified, would result in depriving potential preference applicants of an opportunity to preserve the preference rights guaranteed by the statute. I cannot acquiesce in an interpretation of the statute so lacking in fairness."

The Federal Power Act's preference to public power is part of an unbroken succession of federal statutes restating this policy for more than a half century.[4]

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[3] App. B, p. 114a.

[4] Act of April 16, 1906, 34 Stat. 117, 43 U.S.C. § 522; Federal Power Act, sec. 7 of the Act of June 10, 1920, 41 Stat. 1067, 16 U.S.C. § 800; Sale of Power on Salt River Project, Act of September 18, 1922, 42 Stat. 847, 43 U.S.C. § 598; Boulder Canyon Project Act, sec. 5 of the Act of December 21, 1928, 45 Stat. 1060, 43 U.S.C. § 617d(c); Tennessee Valley Authority Act, Act of May 18, 1933, 48 Stat. 64, 16 U.S.C. §§ 831 i, j; Fort Peck Project Act, Act of May 18, 1933, 52 Stat. 405, 16 U.S.C. § 833 c; Rural Electrification Act, Act of May 20, 1936, 49 Stat. 1365, 7 U.S.C. § 904;

(Footnote continued, next page.)

Some, like the Boulder Canyon Project Act,[5] have incorporated by specific reference the preference provisions of the Federal Power Act. They constitute a cohesive structure of federal policy.

This decision fractures that structure. Chairman Swidler aptly characterized the result:

> "If the language left any doubt, the legislative history shows that section 7(a) was designated to cover precisely the case before us. Rarely has Congress visualized with such prescience the possibility that the administrators of a statute would attempt to frustrate the Congressional intent, and been at such pains to make clear what it meant. Indeed the Congressional intent that the preference applicant be licensed in the circumstances of this case would hardly have been clearer if Congress itself had designated it as the licensee by name. The Commission's decision is therefore particularly egregious and unfortunate."[6]

(Footnote 4, continued.)

Bonneville Project Act, Act of August 20, 1937, 50 Stat. 733, 16 U.S.C. § 832 c; Reclamation Project Act of 1939, Act of August 4, 1939, 53 Stat. 1193, 43 U.S.C. § 485 h; Water Conservation and Utilization Act, Act of August 11, 1939, as amended by the Act of October 14, 1940, 54 Stat. 1124, 16 U.S.C. § 590z-7; Flood Control Act of 1944, Act of December 22, 1944, 58 Stat. 890, 16 U.S.C. § 825s; Act of July 31, 1950, § 2, 64 Stat. 382, 48 U.S.C. § 312a (1964); Atomic Energy Act of 1954, 68 Stat. 919, 43 U.S.C. §§ 2011-281 (1964); Small Reclamation Project Act of 1956, 70 Stat. 1044, 43 U.S.C. §§ 422a-*l* (1964); Niagara Power Project Act, § 1(b)(1), 71 Stat. 401 (1957), 16 U.S.C. § 836(b)(1) (1964); Flood Control Act of 1958, 72 Stat. 319, 33 U.S.C. § 701b-08a (1964). See the discussion of this congressional policy by Attorney General Brownell in 41 Ops. Atty. Gen. 236, 249 (1955).

[5] 45 Stat. 1060 (1928), 43 U.S.C. § 617d(c) (1958).

[6] App. B, p. 101a.

4. Since the decision gives the permittee a "first right" or option to expand his permit, thereby excluding both private and public agencies from licenses upon all potentially better sites outside the disclosed area of the permit, the decision compels the development of an entire waterway to be put into "deep freeze" by issuance of a permit to investigate a single (and inferior) project.

If this decision prevails:

(a) No matter how strictly the permit is specifically bounded, the permittee acquires an exclusive option, without disclosure, *as against both public and private competitors,* upon all sites which might be better adapted than his own for the comprehensive development of the river. (Neither the Commission nor the court below tells us how many miles beyond the permit's boundaries, upstream and downstream, this option runs.) If any competitor is nevertheless able to formulate a better plan for the development of such a competing site, the permittee has a priority under Section 5 which enables him to expropriate the superior plan proposed by that competitor.[7] Moreover, all alternative sites—not just the one ultimately substituted—are locked up in this fashion. Some power sites thus sterilized may be below the confluence of tributaries, as in our case, thus precluding all competitors, public and private, from investigating sites on those tributaries that would be flooded by a dam located below the confluence, even if the permittee ultimately decides against

[7] Public Power spent some two million dollars in developing and presenting to the Commission the superior plan now licensed to the Company, which never proposed this large a power development.

that option and chooses a site above the tributary's inflow.[8]

(b) The remedy available to a state and its public agencies, warned by this decision to protect all sites which might conceivably be in conflict with those named in the notice that they receive, is a simple but conclusive one: to file a permit application on behalf of public power on the site wanted by the power company, or, for that matter, on any alternative site. The statutory preference to a permit is mandatory and unconditional. A public agency's permit application (if this decision is law) preempts all alternative sites as well as the sites named in its application.

Preclusion of the investigation of all potentially competing projects, whether that investigation is to be carried out by public agencies or by private companies, is not in the public interest, and was not the statutory intent. But it is the result compelled by this decision.

If the decision is not reversed, the "deep freeze" in which all competing sites outside the permit are impounded may paralyze them, not only for the three-year period during which the permittee is making up his mind how far to roam outside his permit, but also during all the subsequent years of the licensing proceedings—in this case eleven years, so far.

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[8] As Chairman Swidler points out (App. B, p. 113a), if the Company's permit encompassed the High Mountain Sheep site, it necessarily encompassed also the Nez Perce site, which blocks the Salmon River. The Commission, in fact, evaluated the two sites on the assumption that the High Mountain Sheep licensee would some day build a dam on the Salmon too (App. B, p. 30a, *et seq.*).

5. The decision's rationalization of the need for "flexibility" is answered by the Commission's regulations, which fully protect the permittee.

A company desiring "priority" upon a river's whole "reach" has that opportunity under the Commission's regulations. It may apply for a permit for the investigation of all sites in a disclosed reach of the river, and, by such fair disclosure, followed by public notice [9] and hearing,[10] as the regulations authorize, obtain in advance (if the public interest justifies it) a permit which grants the options desired by the permittee. In our case the Company did not apply for any such options, did not choose to expose them to public notice and hearing and to the risk of a preemptive permit application of a public agency. But the lower court nevertheless reads them into its permit *ex post facto*.

Reg. 4.30 [1] suspends license applications on competing sites on the same "reach" until the permittee has finished examining those disclosed by his permit, as initially issued or as amended. This is all that Section 5 of the act contemplated. Neither that section nor anything in the regulations purports to enlarge his permit to encompass sites not disclosed in his notice and permit, or give him a priority on them, or keep others from obtaining permits and preparing competing plans for projects at those other sites. In 45 years of administering the act, the Commission has never promulgated a regulation to create the option that it here bestows.

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[9] Reg. 4.81, App. H, p. 178a.

[10] Reg. 4.83, App. H, p. 180a.

[1] App. H, p. 169a.

II. THE COURT OF APPEALS HAS DECIDED IMPORTANT FEDERAL QUESTIONS IN THIS CASE IN A WAY WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

1. The decision below, creating an option or floating easement on the public domain, conflicts with this Court's decisions strictly construing grants of privileges in public lands and navigable waters.

The Federal Power Act is one piece in the mosaic of federal laws exercising the plenary powers of Congress over public lands and navigable waters.

This Court has always applied the common law rule that the Government's grants of privileges in these facets of the public domain are to be strictly construed against the grantee.[2] By contrast, the decision below gives the permittee a privilege greater than he applied for or that the Government purported to grant: an unsolicited exclusive right to the occupancy of public lands and navigable waters at any site he may choose to substitute for those granted him, provided only that the same undefined "reach of the river" is affected.

Indeed, if this decision becomes law, it appears impossible for the Commission to lawfully restrict a permit's benefits to its boundaries, no matter how strictly it defines those boundaries.

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[2] Generally: United States v. Grand River Dam Authority, 363 U.S. 229, 235 (1960); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 544-49 (1837). Railroad land grants: United States v. Union Pac. R.R., 353 U.S. 112, 116 (1957); United States v. Oregon & Calif. R.R., 164 U.S. 526, 539 (1896); Leavenworth L. & G. R.R. v. United States, 92 U.S. 733, 745-46 (1876). Spanish and Mexican land grants: Sena v. United States, 189 U.S. 233, 237-38 (1903); Slidell v. Grandjean, 111 U.S. 412, 437 (1884); United States v. King, 44 U.S. (3 How.) 773, 786-87 (1845). Obstructions to navigation: Louisville Bridge Co. v. United States, 242 U.S. 409, 417-18 (1917); Newport & C. Bridge Co. v. United States, 105 U.S. 470, 480 (1882).

Chairman Swidler understates this paradox:[3]

> ". . . I do not mean to suggest that the Commission could not grant a permit with a broader scope but it is hard to imagine how a permit could state its limitations any more clearly than was done in the instant case."

The Federal Power Act is too important to be thus converted into a sole exception to a century of congressional policy by this unprecedented judicial expansion of a specifically limited grant.

These are some of the resulting anomalies:

(1) The decision is at war with the permit and licensing systems of the federal land and water laws from which the Federal Power Act was derived, and those which have followed it. No one has ever suggested that the holder of a permit to prospect for minerals,[4] who has failed to find workable deposits within the permit, has a "first right" to the structure "to which the permit relates," so that he may try again four sections away from his permit, without amendment, and claim a lease if he makes a discovery; or that the right to cut timber[5] within specific advertised boundaries in a national forest gives a "first right" to other timber, to be exercised four miles outside the ad-

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[3] Dissenting, App. B, p. 112a.

[4] Mineral Leasing Act, 41 Stat. 438, as amended, 30 U.S.C. 201 (1964). This statute and the Federal Power Act were enacted by the same Congress in 1920, and have somewhat parallel antecedents as well as structures, i.e., preliminary permits followed by licenses or leases.

[5] Act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. § 476 (1958).

vertised area; or that the holder of a grazing permit[6] which is restricted to specified sections of the public lands may occupy public lands elsewhere, simply because they are better than those granted him; or that a permit to cross the Potomac with a pipeline[7] at 14th Street gives a right to do so at Alexandria, 3.7 miles downstream in the same "reach." Did Congress silently intend a floating easement, an option on public lands, in the Federal Power Act alone?

(2) The decision erases the protection to homesteaders, mineral locators and other investors in the public lands which was written into the act by Sections 4(f) and 24. Section 4(f) requires publication of the description of the lands affected by the project proposed in a permit application in every county in which those lands are situated. Section 24 withdraws from disposal the lands so described. The notice thus published, and the notice to the Secretary which effects this self-executing withdrawal, are literally carbon copies of the notice which Section 4(f) requires to be sent to public agencies: see Reg. 4.81, 4.82. Until now, that notice meant the same thing in all three instances. The permit only segregated from the public domain the lands within its advertised boundaries, and only nullified the public preference within those same boundaries. Not so, if this decision stands. It creates a penumbra of insecurity, extending to limits to be fixed by the permittee's election three years after he publishes his claim. The disclosed boundaries of the withdrawal constitute no protection to the entryman or mineral locator who settles outside them in

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[6] Taylor Grazing Act, ch. 865, 48 Stat. 1270, as amended, 30 U.S.C. § 315b (1964).

[7] River and Harbor Act of 1899, Sec. 10, 30 Stat. 1151, 33 U.S.C. § 403.

reliance upon the published notice, if they are no protection (as this case holds) to the public agency which loses its statutory preference to sites excluded by the notice because it relies upon that same publication.

(3) The decision makes a shambles of the delicate structure of joint federal and state river basin planning created by legislation and executive orders of the past decade and a half. Comprehensive river basin planning necessitates accurate notice of proposed projects to a host of affected federal and state agencies.[8]

How can federal and state conservation agencies plan hereafter for the multiple potential uses of a river, its tributaries, its watershed and forests—for example, for municipal and industrial use, reclamation, flood control, fish and wildlife enhancement, recreation, scenic values,[9] rights-of-way—if all these plans are overshadowed by this undefined lien, its grasp under-

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[8] See, *e.g.*, Federal Water Pollution Control Act § 5(c)(4), as amended, 79 Stat. 908, 33 U.S.C. § 466 (1966 Supp.); Federal Water Project Recreation Act § 7, H.R. 5269, 89th Cong., 1st Sess. (1965); Water Resources Planning Act § 204(3), 79 Stat. 249, 42 U.S.C. § 1962b-3(3) (1965 Supp.); Act of October 27, 1965, § 101(a), 79 Stat. 1073, 42 U.S.C. § 1962d-4(a) (1965 Supp.); Water Resources Research Act of 1964 § 200, 78 Stat. 329, 42 U.S.C. § 1961b (1964); Water Supply Act of 1958 § 301(a), 72 Stat. 297, as amended, 43 U.S.C. § 3906(a) (1964); Fish and Wildlife Coordination Act § 2(a), 48 Stat. 401, as amended, 16 U.S.C. § 622(a) (1964). *Policies, Standards, and Procedures in the Formulation, Evaluation, and Review of Plans for Use and Development of Water and Related Land Resources*, S. Doc. 97, 87th Cong., 2nd Sess. (1962). INTER-AGENCY COMMITTEE ON WATER RESOURCES, *Policies and Procedures for Distribution and Coordination of Reports by Agencies Represented on the Inter-Agency Committee on Water Resources* 3-4 (rev. ed. 1958).

[9] *Cf.* Scenic Hudson Preservation Conf. v. FPC, 354 F. 2d 608 (2d Cir. 1965), *cert. denied* 16 L. ed. 2d 540 (1966).

stated (as here) in the notice they receive, undiscoverable by any inquiry directed to the Commission during the next three years? Is their only remedy to intervene in the later licensing proceedings as an adversary, as the Secretary of the Interior had to do here? Compare the notice of the permit application,[10] to which he gave acquiescence, with the license application that he later had to fight.[1]

There is nothing like this elsewhere in the land laws, all of which require certainty in the appropriation of public resources to private benefit. Congress planted no such hidden options in the Federal Power Act, to be discovered 45 years after its enactment.

2. The decision below misapplied the rule of National Labor Relations Board v. Hearst, 322 U.S. 111 (1944).

The court below applied the wrong paragraph of this Court's holding in the *Hearst* case.[2] The controlling language that it did not quote reads:[3]

> "... Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute."

That is this case.

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[10] App. E, p. 155a. See p. 8, *supra*, for comparison of the projects described in the permit notice and in the Company's license application.

[1] The permit is disclosed by this decision to have included the Nez Perce site, which would block the Salmon River. The present administration has proposed that this be made a "wild river." S. 1446, 89th Cong.

[2] App. A, p. 10a.

[3] 322 U.S. at 130-31.

The court, ignoring this general rule, relied on the exception:[4]

> "... But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."

—the specific question in the *Hearst* case being whether the Board's determination that news boys are "employees" (a term deliberately left undefined in the Labor Relations Act) should be accepted. It was.

That is not this case. The Federal Power Act did not say that a permit should encompass a "reach" and leave the meaning of "reach" for the Commission to define. Instead, it contemplated that permits and licenses should all relate to "projects," defined "project" in Section 3(11)[5] and used that term 69 times, "site" five times, "reach" not at all. In the Commission's regulations, "project" appears 236 times, "site" 19 times, "reach" once (Reg. 4.30) and in a context significantly at odds with the Commission's decision.[6]

Moreover, as next shown, the Commission flatly violated its own substantive regulations in this case. Whatever may be the proper limits of the *Hearst* rule,[7] it has never been stretched to condone that.

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[4] 322 U.S. at 131.

[5] App. G, p. 164a.

[6] See p. 20, *supra*.

[7] This Court has substituted its own judgment for that of the agency where pure questions of law rather than matters of agency discretion and expertise were involved. Otis & Co. v. SEC, 323 U.S. 624 (1944); Social Security Board v. Nierotko, 327 U.S. 358, 367-71 (1945); Unemployment Compensation Commission

(Footnote continued, next page.)

3. The decision below conflicts with this Court's decisions holding that an administrative agency is bound by its own regulations.

This Court has uniformly held that an administrative agency is bound by its own regulations, and has no power to violate them.[8]

Here, the Commission rejected its own regulations on a crucial point.

F.P.C. Regulation 4.84 provides:

> "Applications for amendments of preliminary permits shall follow the form prescribed for original applications, so far as applicable. *If an amendment embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application* . . . ." (Emphasis supplied.)

(Footnote 7, continued.)

v. Aragon, 329 U.S. 143, 155 (1946); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947); SEC v. Central-Illinois Securities Corp., 338 U.S. 95, 155 (1949); Office Employees v. NLRB, 353 U.S. 313, 320 (1957); FTC v. Mandel Bros., 359 U.S. 385, 391 (1959); Red Ball Motor Freight, Inc. v. U. S., 377 U.S. 311 (1964).

[8] This principle has special force when matters of procedural due process before an agency are involved. Service v. Dulles, 354 U.S. 363, 388 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954). Procedural rules established by the Federal Power Commission have been enforced against it by a lower federal court. Public Serv. Comm'n of N.Y. v. F.P.C., 295 F. 2d 140 (D.C. Cir. 1961). An agency is bound by its own rules administering statutes which permit the granting of federal privileges. Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 629 (1950); School Dist. 2 Fractional v. United States, 229 F. 2d 681, 686 (6th Cir. 1956); McKay v. Wahlenmaier, 226 F. 2d 35, 43 (D.C. Cir. 1955). This rule is particularly important when the agency's function is quasi-judicial and the regulation affects the competing claims of litigants before it, as in this case. Seaton v. Texas Co., 256 F. 2d 718, 722 (D.C. Cir. 1958).

It is indisputable that the Power Company's present license application "embraces sites or areas not covered by the original permit," and that no application for an amendment to the permit was ever filed.

The consequences were vital. *No notice was ever given to anyone at any time that any priority on the High Mountain Sheep site was either granted or would ever be claimed under this permit.*[9] Had notice of a claim of priority to this crucial "site or area not covered by the original permit" been given as required by Reg. 4.84, any public agency, so warned, could have asserted its own preference right to a permit. If so, this case would not be here, because under Section 7(a) the preference right of a public agency to a permit is flatly unconditional.

The point was raised below, but ignored by the Court of Appeals. It had been raised before the Commission, but brushed aside there with the reply that "flexibility" is implied in the original permit, hence "why all the fuss about filing for amendments"?[10]

Chairman Swidler answered this:

> "To be sure, it is desirable that an applicant be allowed flexibility and be encouraged to study all reasonable alternatives, including those not known at the time of application for a permit. The way to obtain this flexibility, however, is by allowance of needed amendments, not by construing permits

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[9] See discussion by Chairman Swidler, dissenting, App. B, p. 114a.

[10] App. C, p. 140a.

which purport to cover specific projects as being in effect a charter for a broad stretch of the river, thereby concealing the scope of the permit from the public and interested preference customers . . . .[1]

* * *

"The majority's position is unreasonable because of the inadequate notice—indeed, the wholly false and misleading notice—provided by a preliminary permit under this interpretation, and the resulting failure to give potential competing applicants and other interested parties the statutory notice to which they are entitled. This is no mere academic point, as illustrated by the present proceeding."[2]

CONCLUSION

We respectfully urge that the decision below, one of first impression, wrongly interprets pivotal provisions of the Federal Power Act, conflicts with congressional policies structured into that act to assure the conservation and use of waterways in the public interest, threatens public bodies with loss of federal rights without notice, and threatens federal agencies with interference with their statutory functions. It would sanction monopoly of entire river stretches and pre-

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[1] App. B, p. 113a.

[2] App. B, p. 114a.

clude optimum use of the Nation's water resources. It should be reviewed and reversed by this Court.

Respectfully submitted,

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